13-2952-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DEBORAH D. PETERSON, *et al.*,

Plaintiffs-Appellees,

—against—

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT BANK MARKAZI, THE CENTRAL BANK OF IRAN

DAVID M. LINDSEY
ANDREAS A. FRISCHKNECHT

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, New York 10017
(212) 257-6960

Attorneys for Defendant-Appellant Bank Markazi, The Central Bank of Iran

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. The Assets at Issue Are Not Subject to Execution as "Assets of" Bank Markazi under TRIA § 201. 4

A. TRIA § 201 Requires Actual Ownership; a Mere "Beneficial Interest" Sufficient to Trigger the Blocking of Assets Does Not Suffice. 4

B. At the Time They Were First Restrained, Bank Markazi Was Not the Owner of the Assets at Issue Under Article 8 of the U.C.C. 8

C. Bank Markazi Did Not Become the Owner of the Resulting Cash That Would Have Been Credited to Clearstream's Omnibus Account Upon Redemption of the Underlying Securities. 10

D. The Conflict Between FSIA § 1611(b)(1) and TRIA § 201 Must Be Resolved in Favor of Protecting Assets Held in Connection with Core Central Banking Functions. 12

II. Turnover of the Assets at Issue Pursuant to § 8772 Contravenes the Treaty of Amity Between the United States and Iran. 13

A. The "Notwithstanding" Clause in § 8772 Does Not Abrogate the Treaty……. 13

B. Turnover of the Assets at Issue to Plaintiffs Pursuant to § 8772 Is Not "Necessary to Protect [the] Essential Security Interests" of the United States Within the Meaning of Art. XX.1(d) of the Treaty. 14

III. § 8772 Constitutes an Invalid Legislative Act of Adjudication under Article III of the Constitution. 16

IV. The Retroactive Application of § 8772 to Award Turnover of the Assets at Issue Violates the Fifth Amendment's Takings Clause. 20

V. Bank Markazi's Objection That the District Court Lacked Subject Matter Jurisdiction to Issue its Extraterritorial Injunction Could Never Be Waived, and Plaintiffs Lack Standing to Defend That Injunction Before This Court. 25

CONCLUSION 30

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 31

TABLE OF AUTHORITIES

Page(s)

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998).....20

Axel Johnson Inc. v. Arthur Andersen & Co.,
6 F.3d 78 (2d Cir. 1993) 16, 19-20

Blakney v. Winters,
No. 04–CV–07912, 2008 WL 4874852 (N.D. Ill. Aug. 15, 2008).....14

Calderon-Cardona v. JPMorgan Chase Bank, N.A.,
867 F. Supp. 2d 389 (S.D.N.Y. 2011) 8, 14

Chang v. United States,
859 F.2d 893 (Fed. Cir. 1988) 23

China Trade & Dev. Corp. v. M.V. Choong Yong,
837 F.2d 33, 3 (2d Cir. 1987) 29

Chrysler Corp. v. Brown,
441 U.S. 281 (1979).....13

Clinton v. City of New York,
524 U.S. 417 (1998).....2

Connolly v. Pension Benefit Guar. Corp.,
475 U.S. 211 (1986).....23

Cruz-Miguel v. Holder,
650 F.3d 189 (2d Cir. 2011) 5

Dames & Moore v. Regan,
453 U.S. 654 (1981).....15

EM Ltd. v. Republic of Argentina,
No. 03 Civ. 2507(TPG), 2009 WL 2568433 (S.D.N.Y. Aug. 18, 2009) 11

Gates v. Syrian Arab Republic,
No. 11 C 8715, 2013 WL 1337223
(N.D. Ill. Mar. 29, 2013).....12

Gonzalez v. Thaler,
132 S.Ct. 641 (2012).....25

Green v. City of New York,
465 F.3d 65 (2d Cir. 2006) 13-14

Heiser v. Islamic Republic of Iran,
735 F.3d 934 (D.C. Cir. 2013).....1, 7, 8, 9

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013).....26

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),
313 F.3d 70 (2d Cir. 2002) 9

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994)..... 20-21

In re Lehman Bros. Holdings Inc.,
502 B.R. 376 (Bankr. S.D.N.Y. 2013).....11

Levin v. Bank of New York Mellon,
No. 09 CV 5900(RPP), 2013 WL 5312502
(S.D.N.Y. Sep. 23, 2013).....12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....26

Ministry of Defense & Support for the Armed Forces
of the Islamic Republic of Iran v. Elahi,
556 U.S. 366 (2009)..... 10, 12-13

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247, 130 S.Ct. 2869 (2010).....28

NML Capital, Ltd. v. Banco Central de la República Argentina,
652 F.3d 172 (2d Cir. 2011) 12

Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan,
134 F. Supp. 2d 528 (S.D.N.Y. 2001) 24-25

Paradissiotis v. United States,
304 F.3d 1271 (Fed. Cir. 2002) 15, 23

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978).....23

Pfizer Inc. v. Teva Pharm. USA, Inc.,
803 F. Supp. 2d 409 (E.D. Va. 2011) 5

Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.,
700 F.2d 889 (2d Cir. 1983) 28

Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992).....19

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003).....21

United States v. Cotton,
535 U.S. 625 (2002).....25

United States v. Klein,
80 U.S. 128 (1871).....3, 17, 18

United States v. Sioux Nation of Indians,
448 U.S. 371, 389 (1980).....19

Velez v. Sanchez,
693 F.3d 308 (2d Cir. 2012) 25

Weininger v. Castro,
462 F. Supp. 2d 457 (S.D.N.Y. 2006) 11, 12

Weinstein v. Islamic Republic of Iran,
299 F. Supp. 2d 63 (E.D.N.Y. 2004) 22

Weinstein v. Islamic Republic of Iran,
609 F.3d 43 (2d Cir. 2010) 14, 22

Statutes & Rules

22 U.S.C. § 1611(b)(1).....12

22 U.S.C. § 8772.....*passim*

N.Y. U.C.C. § 8-102(a)(9)(ii).....27

N.Y. U.C.C. § 8-110(b).....8

N.Y. U.C.C. § 8-503.....8, 9

Terrorism Risk Insurance Act of 2002 ("TRIA"),
Pub. L. No. 107-297, Title II, § 201, 116 Stat. 2337.....*passim*

U.S. Const. Art. III.....1, 2

U.S. Const. Amend. V.....1, 3, 20, 23

Other Authorities

Brief for Petitioners, *Robertson v. Seattle Audubon Soc'y*,
No. 90-1596 (U.S. Aug. 27, 1991), 1991 WL 521288..... 17-18

Executive Order No. 13599, 77 Fed. Reg. 6659.....4, 15

Presidential Determination No. 2001-03,
65 Fed. Reg. 66483 (Oct. 28, 2000).....16

Treaty of Amity, Economic Relations and Consular Rights
between the United States and Iran, Aug. 15, 1955,
8 U.S.T. 899.....*passim*

SUMMARY OF THE ARGUMENT[1]

Plaintiffs have failed to rebut Bank Markazi's showing that they cannot meet the requirements for turnover of the Assets at Issue under TRIA § 201 because Bank Markazi never owned those assets, and that the second statute the district court relied on, § 8772, was not a valid basis for turnover because it contravenes the Treaty of Amity as well as the separation of powers under Article III of the Constitution and the Fifth Amendment's Takings Clause.

Plaintiffs conflate Bank Markazi's undisputed "interest" in the Assets at Issue with the showing of *ownership* required to satisfy the "assets of" requirement of TRIA § 201. They also argue that various non-authoritative, purported sources of federal law should determine whether the Assets at Issue are "assets of" Bank Markazi—while failing to mention that the D.C. Circuit in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) recently applied Article 4A of the U.C.C. *as a matter of federal common law* to determine the ownership of blocked EFTs under TRIA § 201. Regardless of whether this Court applies the U.C.C. here as a matter of state or federal law, the Assets at Issue were not "assets of" Bank Markazi under U.C.C. Article 8.

---

[1] Unless otherwise defined herein, all defined terms are as defined in Bank Markazi's opening brief (Document No. 190-1).

Unlike TRIA § 201, § 8772 contains no requirement of ownership. Yet as demonstrated in Bank Markazi's opening brief, § 8772 violates multiple provisions of the Treaty of Amity. Plaintiffs' argument that § 8772 is a valid exercise of the United States' right to take measures "*necessary* to protect its *essential* security interests" under Article XX.1(d) of the Treaty ignores that the Assets at Issue will remain blocked in any event until such time as the Government concludes that their blocking is no longer in the interest of the United States. Turnover of these assets to Plaintiffs therefore is not "necessary" to protect any "essential security interests" of the United States within the meaning of the Treaty.

Nor, contrary to Plaintiffs' assertions, is there anything "ironic" about Bank Markazi's showing that § 8772 constitutes an impermissible legislative intrusion into matters reserved for the judiciary under Article III of the Constitution. The "principal function" of the separation of powers is to "safeguard against the encroachment or aggrandizement of one branch [of Government] at the expense of the other." *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (citation omitted). In the Article III context, vindication of this core purpose plainly does not depend on the identity of the litigants in this or any other case.

By commanding the district court to exclude from consideration any interest of Clearstream—the only party with a legally cognizable interest in the Assets at Issue—§ 8772 indirectly compelled the court below to find that Bank Markazi

holds "equitable title to, or the beneficial interest in" those assets just as surely as if the statute had directly commanded the district court to make that finding. Consequently, § 8772 runs afoul of the controlling Constitutional principle that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *United States v. Klein*, 80 U.S. 128, 146 (1871).

Plaintiffs' argument that this Court's opinion in *Weinstein* precludes Bank Markazi's showing under the Takings Clause ignores the troubling retroactivity concerns that § 8772 presents in this case. The Court's application of TRIA § 201 in *Weinstein* raised no such concerns and accordingly is not dispositive of the issue presented here. Importantly, Plaintiffs do not contest that the appropriate point in time to determine Bank Markazi's investment-backed expectations was when the Assets at Issue were first restrained in June 2008. At that time, Bank Markazi had no reason to expect that Congress would take the unprecedented step of enacting legislation mandating the turnover to judgment creditors of Iran of assets held in connection with the classic central banking purpose of investing foreign currency reserves.

Finally, irrespective of the Court's determination of any other issue presented by this appeal, the extraterritorial Injunction the district court included in its Partial Final Judgment must be vacated because the district court

unquestionably lacked subject matter jurisdiction to issue it. None of the statutes at issue in this appeal conferred jurisdiction on the court below to issue the sweeping Injunction purporting to enjoin Bank Markazi from asserting its property rights against Clearstream in Luxembourg. Plaintiffs' argument that Bank Markazi somehow waived its objection to the Injunction is meritless because an objection to subject matter jurisdiction can never be waived. Moreover, the only party that might have had standing to defend the Injunction before this Court—Clearstream—has opted not to pursue an appeal after entering into a settlement with Plaintiffs, and Plaintiffs lack standing to defend the Injunction in Clearstream's stead.

ARGUMENT

I. The Assets at Issue Are Not Subject to Execution as "Assets of" Bank Markazi under TRIA § 201.

A. TRIA § 201 Requires Actual Ownership; a Mere "Beneficial Interest" Sufficient to Trigger the Blocking of Assets Does Not Suffice.

For all of the following reasons, Plaintiffs have failed to rebut Bank Markazi's showing that the Bank cannot be deemed the owner of the Assets at Issue under applicable law (namely Article 8 of the U.C.C. and Luxembourg law). *First,* Plaintiffs consistently conflate Bank Markazi's amorphous "interest" in the Blocked Assets that triggered their blocking under the Executive Order with the

distinct legal concept of beneficial *ownership*.[2] Yet underlying Plaintiffs' entire argument is a fundamental, unanswered question: if Plaintiffs, as they claim, easily could establish Bank Markazi's *ownership* of the Assets at Issue, why then did they find it necessary to engage in a sustained lobbying effort to persuade Congress to enact a new, tailor-made statute in § 8772?

As the plain wording of the two provisions makes clear, the answer is that § 8772, unlike TRIA § 201, contains no requirement of ownership. While TRIA § 201 requires Plaintiffs to demonstrate that the Assets at Issue are "assets of" Bank Markazi, Bank Markazi's undisputed "beneficial interest" in those assets constitutes a sufficient basis for turnover under § 8772. Congress's use of these two distinct terms in TRIA § 201 and § 8772 underscores that they are far from synonymous. Indeed, even where "Congress uses certain language in one part *of the [same] statute* and different language in another, the court assumes different meanings were intended." *Cruz-Miguel v. Holder*, 650 F.3d 189, 196 (2d Cir. 2011) (internal quotation and citation omitted, emphasis added).

---

[2] As Plaintiffs acknowledge, a "beneficial owner" may be defined as "a person or entity that "has *most to all of the traditional property rights of the owner*, except for actual legal title to the property." *Pfizer Inc. v. Teva Pharm. USA, Inc.*, 803 F. Supp. 2d 409, 425 (E.D. Va. 2011) (emphasis added).

Second, Plaintiffs mischaracterize Bank Markazi's position as being "that the District Court *never ruled*" that Bank Markazi owned the Assets at Issue. Pls.' Br. at 45 (emphasis added). That is not what Bank Markazi said; the district court plainly *did* so rule. (SPA-47). Yet the district court's finding of ownership was not supported by any legal analysis of whether Bank Markazi's "interest" in the Assets at Issue rose to the level of ownership under applicable law—a point that stands unrebutted. *See* Bank Markazi Br. at 20-23.

Third, Plaintiffs' attempts to rely on Bank Markazi's purported "admissions" of ownership ignore the context in which those statements were made. All of the statements Plaintiffs cite date back to immediately after the Bank first appeared in the turnover action in the spring of 2011. *See* Pls.' Br. at 42-43. Not only were those statements made *before* Bank Markazi was granted access to the sealed, prior factual and legal submissions in the litigation (including Clearstream's submissions[3]), but the thrust of Bank Markazi's argument was that the Assets at Issue related to an investment by Bank Markazi—and therefore were not the property *of Iran,* the judgment debtor here. (A-Vol.V-1259) ("[Plaintiffs'] Restraining Notices are ineffective because the Restrained Securities are *prima facie* the property of a third party, Bank Markazi—not the property of

[3] *See* Bank Markazi Br. at 21 n.10.

the IRI [Islamic Republic of Iran] or MOIS [Iranian Ministry of Information and Security], the judgment debtors with respect to plaintiffs' underlying judgment."). Those statements plainly could not transform Bank Markazi into the owner of the Assets at Issue if it did not actually own those assets under applicable law. *See* Bank Markazi Br. at 20-22.

Fourth—and finally, Plaintiffs acknowledge that state law determines "the nature of any interests in or rights to property that an entity may have." Pls.' Br. at 34 (quoting *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010)). Yet they argue that some undefined federal law standard then "dictates" whether Bank Markazi's rights with respect to the Assets at Issue rise to the level of actual *ownership* under TRIA § 201. *See id.* Plaintiffs then proceed to discuss various non-authoritative "potential source[s]" of federal law (including an anti-money laundering manual, a statement of financial accounting concepts, and an I.R.S. publication) while ignoring the one *authoritative* source of law the D.C. Circuit recently applied *as a matter of federal common law* to determine ownership under TRIA § 201—namely the U.C.C. itself.

In an opinion issued only *after* Bank Markazi filed its opening brief and which Plaintiffs conspicuously fail to mention, the D.C. Circuit held in *Heiser* that Article 4A of the U.C.C. "is a proper federal rule of decision for applying the ownership requirement[] of [TRIA] § 201" with respect to the electronic funds

transfers (EFTs) at issue in that case. 735 F.3d at 940-41. As the court noted, "[t]he Uniform Commercial Code is often used as the basis of federal common-law rules." *Id.* at 940. Likewise here, Article 8 of the U.C.C. (and Luxembourg law, the law to which the U.C.C.'s choice of law provisions refer[4]) determines whether the Assets at Issue can be deemed "assets of" Bank Markazi—regardless of whether this Court opts to apply those provisions as a matter of state law, as some courts have,[5] or instead as a matter of federal common law.

B. At the Time They Were First Restrained, Bank Markazi Was Not the Owner of the Assets at Issue Under Article 8 of the U.C.C.

Plaintiffs' argument that Bank Markazi may be deemed "the sole beneficial owner" of the Assets under U.C.C. Article 8 (Pls.' Br. at 48) is incompatible with Article 8 of the U.C.C. Plaintiffs disregard that while Bank Markazi had a "pro rata property interest" in the security entitlements held by Clearstream under U.C.C. § 8-503(b), that "property interest is an interest *held in common by all entitlement holders* who have entitlements to a particular security or other financial asset." U.C.C. § 8-503 cmt. 1 (emphasis added). Thus, a security entitlement "is

---

4 *See* U.C.C. § 8-110(b). Plaintiffs have not even attempted to rebut Bank Markazi's showing that it could not be deemed the owner of the Assets at Issue under Luxembourg law. Accordingly, Bank Markazi rests on its opening brief in this respect. *See* Bank Markazi Br. at 27-28.

5 *See Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 405 (S.D.N.Y. 2011).

not a claim to a specific identifiable thing," but instead is "a package of rights and interests," and "the incidents of this property interest are established by the rules of Article 8, *not by common law property concepts."* U.C.C. § 8-503 cmt. 2 (emphasis added).

Here, Bank Markazi's rights under Article 8 existed exclusively against Clearstream—not Citibank. As the Official Comment to U.C.C. § 8-503 again makes clear: "[T]he entitlement holder can look only to [its] intermediary for performance of the obligations. The entitlement holder cannot assert rights directly against other persons, such as other intermediaries through whom the intermediary holds the positions[.]"). *Id.*

Plaintiffs' argument for turnover under TRIA § 201 thus ignores the basic principle that "a party seeking to enforce a judgment stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 83 (2d Cir. 2002) (internal quotation and citation omitted, alteration in original). In its recent decision in *Heiser*, the D.C. Circuit made clear that this "established principle that a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor" applies with full force to the ownership analysis under TRIA § 201. *Heiser*, 735 F.3d at 938 (internal quotation and citation omitted).

Finally, Plaintiffs seek to avoid Bank Markazi's showing that their restraints on the Assets at Issue (which then consisted of Clearstream's security entitlements vis-à-vis Citibank) in June 2008 were improper to begin with under U.C.C. Article 8 by claiming that the subsequent blocking of those assets nearly four years later should be deemed to have retroactively cured that defect. Yet contrary to Plaintiffs' assertions, *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009) does not support that proposition. *See* Pls.' Br. at 54. The Court in *Elahi* never addressed the issue of whether a plaintiff's improper restraint of property could be cured by subsequent blocking. Indeed, the Court found it unnecessary to decide whether the asset in question there—a federal court judgment confirming a foreign arbitral award—was even *blocked at all*. *See Elahi*, 556 U.S. at 379. Instead, the Court decided the case on the ground that the plaintiff had waived his right to attach the judgment in any event. *See id.*

C. Bank Markazi Did Not Become the Owner of the Resulting Cash That Would Have Been Credited to Clearstream's Omnibus Account Upon Redemption of the Underlying Securities.

Plaintiffs have failed to rebut Bank Markazi's showing that the Bank was not the owner of any cash credited to Clearstream's omnibus account with Citibank upon maturity of the underlying bonds to which Clearstream's security entitlements vis-à-vis Citibank related. *See* Bank Markazi Br. at 31-34. Indeed,

Plaintiffs do not contest that any cash credited to Clearstream's omnibus account with Citibank was *Clearstream's cash*, which it was free to use for any transaction on behalf of any of its customers. (A-Vol.V-1139-40,45,85).

Accordingly, any cash credited to Clearstream's omnibus account was fungible and in no sense belonged to any particular customer of Clearstream's. *See generally In re Lehman Bros. Holdings Inc.*, 502 B.R. 376, 381 (Bankr. S.D.N.Y. 2013) (debtor could not "assert[] bankruptcy claims based on [defendant]'s ongoing possession of debtor property" following defendant's exercise of a contractual right of setoff which "transformed [a] once-segregated cash collateral account into fungible cash that is now indistinguishable from the other cash held by [defendant] in its coffers"). The cases Plaintiffs rely on are inapposite because they did not involve such omnibus accounts that financial institutions use to execute transactions relating to an indefinite number of distinct customers. *See EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507(TPG), 2009 WL 2568433, at *3 (S.D.N.Y. Aug. 18, 2009), *aff'd*, 389 F. App'x 38 (2d Cir. 2010) (permitting judgment creditors of Argentina to attach Argentinian entities' "rights to receive distributions" directly from a trust account); *Weininger v. Castro*, 462 F. Supp. 2d 457, 494, 499 (S.D.N.Y. 2006) (allowing judgment creditors of Cuba to execute against bank accounts specifically "opened for the benefit of, or to hold payments to or for the account of, various Cuban agencies and instrumentalities").

D. The Conflict Between FSIA § 1611(b)(1) and TRIA § 201 Must Be Resolved in Favor of Protecting Assets Held in Connection with Core Central Banking Functions.

Plaintiffs have not even attempted to rebut Bank Markazi's showing that the record evidence unambiguously supports the Bank's consistent position throughout this litigation that the Assets at Issue were held in Clearstream's omnibus account with Citibank in connection with an investment by Bank Markazi of its currency reserves—a classic central banking function within the meaning of FSIA § 1611(b)(1) and *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011). *See* Bank Markazi Br. at 35-36.

The two additional district court cases Plaintiffs cite in opposition that addressed the conflict between FSIA § 1611(b)(1) and TRIA § 201 add nothing to the arguments Bank Markazi previously rebutted in its opening brief. Both *Levin v. Bank of New York Mellon*, No. 09 CV 5900(RPP), 2013 WL 5312502 (S.D.N.Y. Sep. 23, 2013), and *Gates v. Syrian Arab Republic*, No. 11 C 8715, 2013 WL 1337223 (N.D. Ill. Mar. 29, 2013), relied principally on the "notwithstanding" clause in TRIA § 201.[6] Yet neither court appears to have considered the legislative history of TRIA § 201 "suggest[ing] that Congress placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued

[6] Bank Markazi previously addressed the third case Plaintiffs cite, *Weininger*, 462 F. Supp. at 499. *See* Bank Markazi Br. at 37 n.19.

under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Elahi*, 556 U.S. at 386. Nor is Senator Harkin's floor statement dispositive of the meaning of that "notwithstanding" clause because "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). *See* Pls.' Br. at 41.

II. Turnover of the Assets at Issue Pursuant to § 8772 Contravenes the Treaty of Amity Between the United States and Iran.

A. The "Notwithstanding" Clause in § 8772 Does Not Abrogate the Treaty.

Plaintiffs fail to rebut Bank Markazi's showing that Congress's failure to reference the Treaty of Amity in connection with the "notwithstanding any other provision of law" clause in § 8772 is indicative of Congressional reluctance to abrogate the Treaty. *See* Bank Markazi Br. at 43-44. In particular, Plaintiffs avoid Bank Markazi's central argument that unlike the "notwithstanding" clause in TRIA § 201, the "notwithstanding" clause in § 8772 includes particularized language providing that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law*[.]" 22 U.S.C. § 8772(a)(1) (emphasis added). The conspicuous absence in § 8772 of any reference to the Treaty despite the statute's *explicit* abrogation of these other "provision[s] of law" distinguishes this case from *Weinstein*. *See generally Green v. City of New York*, 465 F.3d 65, 79

(2d Cir. 2006) ("[I]n searching for the meaning Congress intended, we consider the context in which a particular word occurs because a statutory term 'gathers meaning from the words around it.'") (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Nor have Plaintiffs rebutted Bank Markazi's showing that the language in *Weinstein* the district court relied on—commencing with "even assuming, *arguendo*"— is *dicta*. *See Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 53 (2d Cir. 2010); *Calderon-Cardona*, 867 F. Supp. 2d at 405 (characterizing the relevant passage in *Weinstein* as *dicta*); *Blakney v. Winters*, No. 04–CV–07912, 2008 WL 4874852, at *8 (N.D. Ill. Aug. 15, 2008) (where "court stated that is [sic] was 'assuming arguendo,' it clearly signaled that portion of its opinion was obiter dicta and the court was not addressing the merits of Petitioner's claim").

B. Turnover of the Assets at Issue to Plaintiffs Pursuant to § 8772 Is Not "Necessary to Protect [the] Essential Security Interests" of the United States Within the Meaning of Art. XX.1(d) of the Treaty.

Plaintiffs contend that § 8772 does not contravene the Treaty of Amity because the Treaty permits the United States to take measures "*necessary* to protect its *essential* security interests." Treaty Art. XX.1(d) (emphasis added). Yet the sole authority Plaintiffs cite for the proposition that turnover to them of the Assets at Issue is "necessary to protect [the] essential security interests" of the

United States, *Paradissiotis v. United States*, 304 F.3d 1271, 1274 (Fed. Cir. 2002), does not support Plaintiffs' argument.

The court in *Paradissiotis* stated that "actions taken for national security reasons *to freeze the assets of*, or *prohibit transactions by*, foreign entities" are generally deemed permissible. *Paradissiotis*, 304 F.3d at 1274 (emphasis added). Yet the *blocking* or freezing of the Assets at Issue under the Executive Order is not at issue in this appeal. Instead, the issue here is whether a statute exclusively targeting assets in which Bank Markazi had an interest *for turnover to Plaintiffs* is "necessary to protect [the] essential security interests" of the United States within the meaning of Article XX.1(d) of the Treaty. Plaintiffs cite no authority for that proposition.

On the contrary, the traditional purpose of blocking regimes was to "permit the President to maintain [the blocked] assets at his disposal" for use "as a 'bargaining chip'" when "negotiating the resolution of a declared national emergency." *Dames & Moore v. Regan*, 453 U.S. 654, 656 (1981). Yet § 8772 prohibits the President from using the Assets at Issue for any such purpose by providing that those assets are subject to turnover "*whether or not* [they are] subsequently unblocked." § 8772(a)(1)(B) (emphasis added). As former President Clinton stated in connection with his waiver of FSIA § 1610(f)(1), an earlier provision providing for the distribution of blocked assets to judgment creditors,

such provisions affirmatively "*impede* the ability of the President to conduct foreign policy in the interest of national security." Presidential Determination No. 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000) (emphasis added).

III. § 8772 Constitutes an Invalid Legislative Act of Adjudication under Article III of the Constitution.

Plaintiffs have failed to rebut Bank Markazi's showing that § 8772 "usurp[s] the adjudicative function assigned to the federal courts under Article III." *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993). The statute's overtly stated and plainly intended purpose is to determine *all* of the issues in this litigation in Plaintiffs' favor. *See* Bank Markazi Br. at 50-52. That the statute nominally required the district court to make two formal "determinations" prior to awarding turnover of the Assets at Issue to Plaintiffs is of no practical (or legal) significance because Congress carefully crafted the required "determinations" to guarantee its desired result. *See* Bank Markazi Br. at 53-54.

Indeed, Plaintiffs tacitly admit that that they can conceive of no plausible scenario in which they would not have prevailed in the court below given the plain wording of § 8772 (assuming the statute were deemed to be Constitutional and to override the Treaty of Amity, as the district court erroneously found). Instead, their principal argument derives from the unremarkable proposition that "if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment." Pls.' Br. at 11 (quoting *Nat'l*

Juvenile Law Center, Inc. v. Regnery, 738 F.2d 455, 465 (D.C. Cir. 1984)). Because Congress in § 8772 changed the law during the pendency of this case, Plaintiffs contend, no further inquiry into the constitutionality of the statute is required (or permitted).

Yet the truism that the legislative branch may change existing law as it deems fit within Constitutional bounds, and that new legislation routinely impacts pending cases, plainly is not dispositive of the issue presented here. Instead, the controlling Constitutional principle is that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" *Klein*, 80 U.S. at 146. Plaintiffs do not contest this rule, yet they claim that "[u]nlike *Klein*, this case involves no Congressional dictate that the courts reach a particular conclusion." Pls.' Br. at 15.

At least implicitly, Plaintiffs thus acknowledge that Congress could not have Constitutionally required the district court in this case to find that "Iran" (defined to include Bank Markazi) "holds equitable title to, or a beneficial interest in" the Assets at Issue. Indeed, such a provision would be akin to the following, hypothetical statute the Solicitor General used to illustrate the pertinent Constitutional issue in *Robertson*: "If Congress . . . enacted legislation providing that, 'In the case of George Jones v. Secretary of Health & Human Services, the court shall find that George Jones owns a yacht,' a serious Article III problem

would be presented because Congress, by specifying a factual finding from the evidentiary record in a particular case, would be invading the court's adjudicative function." Brief for Petitioners at 36 n.35, *Robertson v. Seattle Audubon Soc'y*, No. 90-1596 (U.S. Aug. 27, 1991), 1991 WL 521288.

Yet in § 8772, Congress achieved precisely the same result—effectively compelling the district court to make a factual finding that "Iran" (defined to include Bank Markazi) holds "equitable title to, or the beneficial interest in" the Assets at Issue—by commanding it to exclude from consideration any interest of Clearstream, the only *other* party that vigorously (and for years) had asserted an interest in those assets.[7] *See* 22 U.S.C. § 8772(a)(2) (requiring the court to determine whether "a person *other than* Iran holds . . . equitable title to, or a beneficial interest in, the [Assets at Issue] (*excluding a custodial interest of a foreign securities intermediary* . . . that holds the assets abroad for the benefit of Iran)") (emphasis added).

Under *Klein*, the fact that Congress in § 8772 opted to "prescribe rules of decision" *indirectly*—through careful wording of the required "determinations" such that there could be only one possible outcome—rather than *directly* prescribing such rules of decision is a distinction without a difference. What

---

[7] *See* Clearstream's Consol. Mem. (A-Vol.VI-1568,78); Clearstream's Supp. Mem. (A-XXI-6011).

matters, instead, is that Congress in § 8772 compelled the district court's ultimate determination of the factual and legal issues in this case in Plaintiffs' favor. That the district court may have had to go through the motions of "judicial fact-finding and legal interpretation" (Pls.' Br. at 16) cannot cure the statute's Constitutional infirmity because Congress preordained the result. *Cf. United States v. Sioux Nation of Indians*, 448 U.S. 371, 389, 405 (1980) (statute providing for *de novo* review by the Court of Claims of an existing judgment was constitutional under *Klein* where "Congress made no effort . . . to control the Court of Claims' ultimate decision of [the underlying] claim"); *accord. Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (statute deeming compliance with two new provisions equivalent to compliance with five provisions under prior law was constitutional where it contained "nothing . . . that purported to direct any particular findings of fact *or applications of law, old or new, to fact*") (emphasis added);[8] *Axel Johnson*, 6 F.3d at 82 (statute that merely "changed [a] rule of law by establishing a different

[8] The *Robertson* Court expressly declined on procedural grounds to address whether "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue" in a particular case. *Id.* at 441. In *Robertson*, this issue was raised only in an *amicus* brief but "was neither raised below nor squarely addressed by the Court of Appeals, nor was it advanced . . . in this Court." *Id.*

limitations period for certain [securities fraud] cases" did not violate separation of powers).

Finally, Plaintiffs contend that the title of § 8772(a)(2), "Court determination required," somehow "underscores the important fact-finding role that Congress reserved for the courts." Pls.' Br. at 12. Yet "the title of a statute and the heading of a section" are merely "'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). Here, no "doubt" or ambiguity exists concerning the meaning of § 8772. Instead, the statutory text makes clear that any token "fact-finding role" Congress "reserved for the courts" in § 8772 is confined to a just a few carefully-circumscribed questions in order "to ensure that" the courts would arrive at Congress's desired result—the turnover of the Assets at Issue to Plaintiffs.

IV. The Retroactive Application of § 8772 to Award Turnover of the Assets at Issue Violates the Fifth Amendment's Takings Clause.

Plaintiffs' argument that *Weinstein* "defeats" Bank Markazi's showing that the application of § 8772 to award turnover of the Assets at Issue to Plaintiffs effects a taking ignores the significant retroactivity concerns present in this case that did not exist in *Weinstein*. *See* Pls.' Br. at 24-25. The Supreme Court has emphasized that "retroactive statutes raise particular concerns," including with respect to the Takings Clause. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266

(1994). Indeed, the legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* This concern is heightened in the case of § 8772 and TRIA § 201, which—as Plaintiffs acknowledge—are designed not only to facilitate attachment and execution by judgment creditors, but also to *punish* the targeted entities. *See* Pls.' Br. at 26-27 (arguing that "*punishing* terrorist entities" constitutes a valid public purpose under TRIA § 201) (emphasis added) (citing *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012)).[9]

As demonstrated in Bank Markazi's opening brief, Plaintiffs' restraint of the Assets at Issue here was improper to begin with. *See* Bank Markazi Br. at 25-26, 56-57. Yet despite Clearstream's efforts to lift the restraints, litigation in the district court dragged on for over three and a half years before the Assets at Issue eventually were blocked in February 2012.[10] Once blocked, Plaintiffs successfully

---

[9] This element of punishment distinguishes turnover pursuant to § 8772 and TRIA § 201 from an ordinary award of compensatory damages, which typically would not be deemed punitive in nature. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

[10] Plaintiffs' attempt to fault Bank Markazi for not *independently* moving to vacate the restraints is meritless. *See* Pls.' Br. at 31. Plaintiffs did not commence their turnover action against Bank Markazi until June 2010. (A-Vol.V-1214-15). When it first appeared in the turnover action in the spring of 2011, Bank Markazi indicated its understanding that Clearstream's

lobbied Congress to enact new legislation retroactively legalizing their restraints and compelling distribution of the Assets at Issue to them.

Unlike this case, the facts in *Weinstein* implicated no such retroactivity concerns. In *Weinstein*, judgment creditors of Iran sought to attach certain real property of Bank Melli (a state-owned Iranian bank) in 2007, *after* Bank Melli's assets were blocked in 2005. *See Weinstein*, 609 F.3d at 46-47.[11] The *Weinstein* Court specifically relied on the fact that Bank Melli "had clear notice from the TRIA, *enacted five years earlier*, that such actions could result in the designation and blocking of its assets under the TRIA, which could in turn subject them to attachment." *Id.* at 54 (emphasis added). Yet here, Bank Markazi plainly lacked any comparable notice in 2008 that § 8772—a statute enacted *more than four years later* in August 2012—would provide a basis for turnover of the Assets at Issue to Plaintiffs after those assets were blocked in February 2012.

Plaintiffs gloss over this critical distinction between this case and *Weinstein* and ignore the absence of any "set formula" for determining when a particular

---

motion to vacate the restraints "[wa]s now fully briefed and await[ed] a decision" by the court below. (A-Vol.V-1229). Under those circumstances, a further motion by Bank Markazi would have been wholly duplicative of Clearstream's existing motion.

[11] The district court in *Weinstein* previously had rejected the judgment creditors' attempt to attach other assets of Bank Melli *before* they were blocked. *See Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 76 (E.D.N.Y. 2004).

statute effects a taking in violation of the Takings Clause. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citation omitted). On the contrary, a Takings Clause analysis requires "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

For at least two reasons, the *Penn Central* factors[12] militate against the retroactive legalization of Plaintiffs' restraints here. *First,* the two Federal Circuit cases Plaintiffs cite in opposition do not support their argument that "the character of the government action" at issue here is "unassailable." Pls.' Br. at 26 (citation omitted). *Paradissiotis*, 304 F.3d at 1272, and *Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988), both addressed the *freezing or blocking* of assets under applicable U.S. sanctions—not the *turnover* of assets to judgment creditors. Hence, those cases provide no support for the application of § 8772 to award the Assets at Issue to Plaintiffs here. *See* discussion in Section II.B, *supra*, in connection with the Treaty of Amity.

---

[12] The *Penn Central* factors are: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Connolly*, 475 U.S. at 225 (quotations omitted) (citing *Penn Central Transportation Co.*, 438 U.S. at 124).

Second, Plaintiffs do not (and cannot) contest Bank Markazi's showing that the relevant point in time to determine the Bank's "investment-backed expectations" was when the Assets at Issue were first restrained in 2008—not after they were blocked in 2012.[13] *See* Bank Markazi Br. at 56-57. Yet Plaintiffs argue that Bank Markazi "could not reasonably expect in 2008 that Congress would permit Iran's central bank to benefit from American investments indefinitely" given the existing U.S. restrictions on the processing of payments at that time. Pls.' Br. at 28. Yet those existing restrictions were not remotely comparable to Plaintiffs' *execution* against the Assets at Issue that § 8772 authorized years later. Indeed, the turnover of assets in which a foreign central bank has an interest relating to an investment of its foreign currency reserves to judgment creditors of its parent state was (and is) without precedent, and Bank Markazi as of 2008 had *no reason* to expect or anticipate the enactment of such legislation. *See, e.g.*, *Olympic Chartering, S.A. v. Ministry of Indus. & Trade of Jordan*, 134 F. Supp. 2d 528, 534 (S.D.N.Y. 2001) ("If the funds at issue are used for central bank functions

---

13 Instead, Plaintiffs' position is that Bank Markazi's expectations as of 2008 became irrelevant once the Assets at Issue were blocked years later in 2012. *See* Pls.' Br. at 31. That argument fails because it is premised on the same erroneous reading of *Elahi* previously rebutted above in connection with the requirement of ownership under TRIA § 201. *See* discussion *supra* at p. 10.

as these are normally understood, then they are immune from attachment, even if used for commercial purposes.").

V. Bank Markazi's Objection That the District Court Lacked Subject Matter Jurisdiction to Issue its Extraterritorial Injunction Could Never Be Waived, and Plaintiffs Lack Standing to Defend That Injunction Before This Court.

Plaintiffs' assertion that Bank Markazi should be deemed to have waived its objection to the district court's sweeping extraterritorial Injunction is quickly dispensed with because "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler,* 132 S.Ct. 641, 648 (2012) (an objection based on lack of subject matter jurisdiction "may be resurrected at any point in the litigation"). Indeed, Bank Markazi could raise this objection for the first time in this appeal even if it had never raised it *at all* in the court below. *United States v. Cotton,* 535 U.S. 625, 630 (2002) ("[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court."). This Court's review of whether the district court had subject matter jurisdiction to issue the Injunction is *de novo* (and not for "abuse of discretion" as Plaintiffs erroneously contend; *see* Pls.' Br. at 11). *E.g.*, *Velez v. Sanchez*, 693 F.3d 308, 314 (2d Cir. 2012) ("[W]e review questions of subject matter jurisdiction *de novo.*") (internal quotation and citation omitted).

Moreover, Plaintiffs lack Article III standing to contest Bank Markazi's showing that the district court had no authority to issue the Injunction purporting to

enjoin Bank Markazi from asserting its property rights against Clearstream in Luxembourg. The only party that might have had standing to do so—Clearstream—has chosen not to pursue an appeal. "To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).[14] Plaintiffs cannot meet this most elemental requirement of standing here.

Assuming *arguendo* that this Court were to affirm the district court's Partial Final Judgment in every respect *other than* the Injunction, Plaintiffs would suffer no injury whatsoever. Their only interest in this appeal concerns their ability to execute upon the Assets at Issue in New York. Bank Markazi's ability to assert its rights against Clearstream in Luxembourg, by contrast, is of no genuine concern to them. Indeed, the Injunction was included in paragraph 13 of the Partial Final Judgment solely at Clearstream's request (A-Vol.IV-1036,38,50) and *was not even part* of Plaintiffs' original proposed judgment (A-Vol.IV-975-76). As Clearstream's counsel indicated at the same hearing Plaintiffs cite in opposition,

[14] In *Lujan*, 504 U.S. 555, the Supreme Court laid out the "irreducible constitutional minimum of standing" as follows: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at 560-61.

"what this whole order [*i.e.*, the Partial Final Judgment] relates to" are "the assets that have been deposited by Citibank into the QSF [*i.e.*, the Qualified Settlement Fund]." S.D.N.Y. Dkt. # 466 at 21; *see also id.* at 23 (Clearstream's counsel stating that the "funds being deposited by Citibank [are] the funds that are at issue in this order"). Yet the Injunction *does not* pertain to those assets, but instead is directed at Bank Markazi's property rights vis-à-vis Clearstream *in Luxembourg*.

Even were the Court to consider them, Plaintiffs' remaining arguments fail for the following reasons. *First*, Plaintiffs do not contest (and thus concede) that no provision of the FSIA conferred subject matter jurisdiction on the district court to issue the Injunction purporting to enjoin Bank Markazi from asserting its property rights against Clearstream outside the United States. *See* Bank Markazi Br. at 58-59.

Second, Plaintiffs' argument that the incorporation of the U.C.C.'s definition of "financial asset" in § 8772(d)(2) somehow conferred subject matter jurisdiction to issue the Injunction ignores the important statutory proviso "*[a]s context requires.*" *See* U.C.C. § 8-102(a)(9)(ii) ("*As context requires*, the term ["financial asset"] means *either* the interest itself *or* the means by which a person's claim to it is evidenced, including . . . a security entitlement.") (emphasis added). Yet the only "context" in which § 8772 refers to Bank Markazi's security entitlements vis-à-vis Clearstream is *to distinguish them* from the Assets at Issue held in New York.

See 22 U.S.C. § 8772(a)(1)(C) (recognizing that the Assets at Issue are "equal in value to"—yet distinct from—the "financial asset[s] of Iran" (defined to include Bank Markazi) that the relevant "foreign securities intermediary [i.e., Clearstream] . . . *holds abroad*.") (emphasis added). Plainly, therefore, the statute does not treat the Assets at Issue and Bank Markazi's security entitlements vis-à-vis Clearstream as "one and the same" as Plaintiffs erroneously contend. *See* Pls.' Br. at 63.

Third, § 8772's purported "purpose of sanctioning Iran" (Pls.' Br. at 62) cannot create subject matter jurisdiction where none otherwise exists. "[C]ourts are not to infer a grant of jurisdiction absent a clear legislative mandate." *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983) (declining to construe a statute "as *sub silentio* conferring jurisdiction"). § 8772 contains no such "clear legislative mandate."

Fourth, it is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2873 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). No such intent appears in the text of § 8772. Consequently, where, as here, "a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

Fifth—and finally, Plaintiffs' argument that the district court had inherent authority to issue the Injunction as a means of protecting its discharge of Clearstream fails because the Injunction does not meet the requirement that "resolution of the case before the enjoining court [must be] *dispositive of* the action to be enjoined." *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) (emphasis added). Plainly, the district court's award of the Assets at Issue to the Qualified Settlement Fund established for Plaintiffs' benefit is not "dispositive of" Bank Markazi's rights against Clearstream in Luxembourg. Moreover, this Court in *China Trade* cautioned that "an anti-foreign-suit injunction should be used sparingly and should be granted only with care and great restraint." *Id.* at 36 (internal citation and quotations omitted).

CONCLUSION

For the reasons set forth herein, the District Court's Partial Final Judgment should be reversed.

Dated: New York, New York
February 18, 2014

Respectfully Submitted,

/s/ David M. Lindsey

David M. Lindsey
Andreas A. Frischknecht

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com
www.chaffetzlindsey.com

Attorneys for Appellant Bank Markazi

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

February 18, 2014

/s/ David M. Lindsey

David M. Lindsey
Andreas A. Frischknecht

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
d.lindsey@chaffetzlindsey.com
www.chaffetzlindsey.com

Attorneys for Appellant Bank Markazi